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04 UNITED STATES DISTRICT COURT
05 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

06 ABBAS H. AL-IMGHASHGHASH,) CASE NO. C06-0058-JCC
07 Plaintiff,)
08 v.) REPORT AND RECOMMENDATION
09 JO ANNE B. BARNHART, Commissioner) RE: SOCIAL SECURITY
of Social Security,) DISABILITY APPEAL
10 Defendant.)
11 _____)

12 Plaintiff Abbas H. Al-Imghashghash proceeds through counsel in his appeal of a final
13 decision of the Commissioner of the Social Security Administration (Commissioner). The
14 Commissioner denied plaintiff's application for Supplemental Security Income (SSI) benefits and
15 Disability Insurance (DI) benefits after a hearing before an Administrative Law Judge (ALJ).
16 Having considered the ALJ's decision, the administrative record (AR), and all memoranda of
17 record, it is recommended that this matter be REMANDED for further administrative proceedings.

18 **FACTS AND PROCEDURAL HISTORY**

19 Plaintiff was born on XXXX, 1969.¹ He completed high school in Iraq and some post-
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21 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the
22 General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the
official policy on privacy adopted by the Judicial Conference of the United States.

01 secondary school. Plaintiff previously worked as a dishwasher, cashier, and seafood processor.

02 Plaintiff filed applications for SSI and DI on September 9, 2002, with a protective filing
03 date of August 26, 2002, alleging disability beginning April 29, 1997 due to a right eye injury,
04 brain injury, and left arm injury. (AR 78-80, 192, 503-07.) His applications were denied initially
05 and on reconsideration, and he timely requested a hearing. On May 27, 2004, ALJ Edward
06 Nichols held a hearing, taking testimony from plaintiff and medical expert Dr. Norman Gustofson.
07 (AR 545-91.) On November 10, 2004, ALJ Nichols issued a decision finding plaintiff not
08 disabled. (AR 28-34.)

09 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on
10 November 17, 2005, making the ALJ's decision the final decision of the Commissioner. (AR 9-
11 13.) Plaintiff appealed this final decision of the Commissioner to this Court.

12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
17 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
18 engaged in substantial gainful activity during the period at issue. At step two, it must be
19 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's status
20 post head injury and severe depression severe. Step three asks whether a claimant's impairments
21 meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or
22 equal the criteria for any listed impairments. If a claimant's impairments do not meet or equal a

01 listing, the Commissioner must assess RFC and determine at step four whether the claimant has
02 demonstrated an inability to perform past relevant work. The ALJ assessed plaintiff's RFC and
03 found him able to perform a limited range of light work, including his past relevant work as a
04 convenience store cashier or parking lot cashier. If a claimant demonstrates an inability to perform
05 past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the
06 claimant retains the capacity to make an adjustment to work that exists in significant levels in the
07 national economy. Finding plaintiff not disabled at step four, the ALJ did not proceed to step five.

08 This Court's review of the ALJ's decision is limited to whether the decision is in
09 accordance with the law and the findings supported by substantial evidence in the record as a
10 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
11 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
12 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
13 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
14 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
15 2002).

16 Plaintiff initially requested remand for an award for benefits in this case. However, in
17 reply, plaintiff agreed with the Commissioner that a "sentence four" remand for further
18 administrative proceedings would be appropriate. *See* 42 U.S.C. § 405(g) ("The court shall have
19 power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying,
20 or reversing the decision of the Commissioner of Social Security, with or without remanding the
21 cause for a rehearing.") The only remaining dispute relates to new evidence the Commissioner
22 submitted with her memorandum requesting remand. Plaintiff also requests that this Court provide

01 specific directions to the Commissioner in conducting further administrative proceedings.

02 New Evidence Submitted by Commissioner

03 The Commissioner asserted the need for further administrative proceedings based, in part,
04 on the recent discovery of earnings posted to plaintiff's earnings record for the years 2004 and
05 2005 – \$11,396.24 and \$5,305.85 respectively. (See Dkt. 15 at 6-7 & Dkt. 16.) The
06 Commissioner states that this information must be addressed by the ALJ to determine if any of the
07 earnings represent substantial gainful activity during the alleged period of disability, and because
08 the additional earnings provide plaintiff with additional quarters of coverage and will extend
09 plaintiff's date last insured. The Commissioner further states that, although evidence not part of
10 the record before the ALJ is ordinarily not reviewable by the courts other than pursuant to
11 sentence six of 42 U.S.C. § 405(g),² other errors in the ALJ's decision call for the remand of the
12 entire matter pursuant to sentence four. Plaintiff responds that the earnings, if accurate, are not
13 part of the administrative record in these proceedings and that the Commissioner lacks any
14 statutory or regulatory basis to file additional evidence that does not relate to the decision before
15 the Court.

16 As indicated above, the parties agree that this matter should be remanded for further
17 administrative proceedings. On remand, "[a]ny issues relating to [plaintiff's] claim may be
18 considered by the administrative law judge whether or not they were raised in the administrative
19 proceedings leading to the final decision in [his] case." 20 C.F.R. §§ 404.983, 416.1482

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21 ² Pursuant to a sentence six remand, "[t]he court . . . may at any time order additional
22 evidence to be taken before the Commissioner . . . , but only upon a showing that there is new
evidence which is material and that there is good cause for the failure to incorporate such evidence
into the record in a prior proceeding[.]" 42 U.S.C. § 405(g).

(addressing cases remanded by a federal court). Accordingly, upon remand of this matter for further administrative proceedings, the ALJ may consider plaintiff's earnings during the relevant time period and any evidence pertinent to that step one inquiry.

Directions on Remand

In accordance with plaintiff's request, the undersigned provides guidance for the ALJ on remand. On remand, the ALJ should do the following:

- Evaluate plaintiff's mental impairments pursuant to the requirements of 20 C.F.R. §§ 404.1520a(e)(2) and 416.920a(e)(2).
- Reassess physicians' opinions. *See Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (in general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician; where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "clear and convincing" reasons; where contradicted, a treating or examining physician's opinion may not be rejected without "specific and legitimate reasons" supported by substantial evidence in the record for so doing." (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991) and *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983))). In particular, the ALJ should:

- Address the opinions of treating physician Dr. William Longstreth, including his diagnoses of opthmoplegia with dipopia, central pain syndrome with dysesthesias in the left upper extremity, and post-traumatic neuropsychiatric syndrome;
- Address the opinions of examining physicians Drs. Elena Robinson, Dana Harmon, Kenneth Muscatel, Ronald Early, and Alan Breen;

- 01 • Address the opinions of the state agency psychologists that plaintiff was limited to
02 simple tasks and should not work directly with the public; and
- 03 • Address the results of a physical capacities evaluation conducted in June 2000
04 which indicated plaintiff could perform work in the “sedentary-light” category.
05 (AR 389-92).
- 06 • Reassess plaintiff’s testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th
07 Cir. 2001) (absent evidence of malingering, an ALJ must provide clear and
08 convincing reasons to reject a claimant’s testimony); *Light v. Social Sec. Admin.*,
09 119 F.3d 789, 792 (9th Cir. 1997) (“In weighing a claimant’s credibility, the ALJ
10 may consider his reputation for truthfulness, inconsistencies either in his testimony
11 or between his testimony and his conduct, his daily activities, his work record, and
12 testimony from physicians and third parties concerning the nature, severity, and
13 effect of the symptoms of which he complains.”); *Lester*, 81 F.3d at 834 (“General
14 findings are insufficient; rather, the ALJ must identify what testimony is not
15 credible and what evidence undermines the claimant’s complaints.”); Social
16 Security Ruling 96-7p.
- 17 • Address evidence of medication side effects.
- 18 • Further consider and make new findings at all steps of the sequential evaluation
19 process, including whether plaintiff engaged in substantial gainful activity during
20 the period at issue, the reassessment of plaintiff’s RFC, the inclusion of limitations
21 to account for all of plaintiff’s impairments, and, if necessary, an assessment at step
22 five.

CONCLUSION

This matter should be REMANDED for further administrative proceedings consistent with the above discussion. A proposed order accompanies this Report and Recommendation.

DATED this 30th day of August, 2006.



Mary Alice Theiler
United States Magistrate Judge